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THE RIGHT AND POWER OF EMINENT DOMAIN IN THE NATIONAL GOVERNMENT.

ITS EXERCISE WHOLLY INDEPENDENT OF ALL ASSISTANCE, AGENCY OR CONSENT OF THE STATES. CORRECTIONS OR EXPLANATIONS OF SOME IMPORTANT MISCONCEPTIONS WHICH HAVE HITHERTO PREVAILED VERY EXTENSIVELY UPON THE SUBJECT. AT WHAT TIME COMPENSATION MUST BE MADE.

THE main question, which we here propose to discuss seems to us to be one of more vital importance, and attended with more consequences essential, we might almost say fundamental, to the very existence of independent, self-acting, national sovereignty, than the mass of the people, or of the profession even, have generally regarded it.

We suppose it is now pretty generally conceded, that our national government is a complete sovereignty, and that it was intended to have it possess all the powers of national sovereignty, independent of, and paramount to, all state sovereignty. We apprehend, too, that no one will now question, that the state and national sovereignties embrace the same territorial limits, each possessing sovereign power over such territory, for the exercise of its own peculiar functions, and that each is, nevertheless, as completely distinct from, and independent of, the other, as any two foreign states or governments. This is very fully stated by Chief Justice TANEY, in *Ableman* v. *Booth*, 21 How. U. S. 506, and is the pervading doctrine of all the decisions of that Court, wherever the question has arisen.

It will, therefore, be very apparent to all, that if the nation is really left dependent upon state legislatures for the ordinary exercise of the power of eminent domain, it will form a very surprising exception to the general theory of the national government. The fatal defect in the old confederation was precisely this, that it possessed no automatic functions, but was entirely dependent upon the action of the states. It was the leading, and almost exclusive purpose, of the framers of our national Constitution, to cure this very defect. It must then be very apparent to all, that if this important and indispensable power of sovereignty was still left under the exclusive control of the states, it will form a very marked and unaccountable exception to the general scope and purpose of the national Constitution. There is certainly nothing else in that instrument at all analogous to it. These considerations would surely justify any one in requiring very satisfactory evidence, that such is the necessary or natural construction of those provisions of the national Constitution, before he could fairly come to any such conclusion.

Our examination of that instrument leads to the conclusion, that there is not only no provision of that kind to be found in it, but that the contrary is expressly declared, in two of its provisions, in terms not susceptible of any other fair interpretation. In art. i., section 8, defining the powers of Congress, it is provided, that Congress shall "exercise exclusive legislation" over the territory ceded by the states for the "seat of the government of the United States, and over all places purchased by the consent of the legislature of the state * * * for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." This last clause, upon the well-known rule of construction, that a general clause following a specific enumeration, must be restricted to things *ejusdem generis* with the specific enumeration, can only mean, "other buildings needful" for the purposes of forts, magazines, &c. The first inquiry will then be, by what sovereignty is the site of those erections to be "purchased"? It must be by the national sovereignty, since to understand that word as having reference to the states would make nonsense of the provision. And it has been well said by the Supreme Court of the United States, in numerous cases, that the national Constitution was adopted with such careful deliberation, that we may fairly regard every word as having some definite and distinct meaning. We cannot, then, understand "pur-

chased by the consent of the legislature of the state" as meaning purchased by the states, by the consent of the states, for this would be a looseness of expression for which there is no parallel in any other portion of that instrument. It must import a purchase by the national government with the consent of the states. The difference of language, too, between this provision and that in regard to the seat of the national government, shows very clearly that the intent was not a mere cession of the exclusive territorial jurisdiction. There is here to be a *purchase*, by the national sovereignty, of the proprietary right to the sites of "forts," &c. But what is here implied by the word "purchased"? It must naturally have the same import as in the ordinary case of purchasing land, by the sovereignty, for public purposes. It must of course embrace all the modes of such purchase, *i. e.*, by the consent or voluntary relinquishment of the owner, and also by proceedings *in invitum*, for the condemnation of such land to such use, whenever that becomes necessary. For we cannot suppose that it was intended to leave the paramount national sovereignty at the mercy, or caprice, of every land-owner, as to whether it would be able to obtain the most eligible sites for its forts, and other military and naval stations. There are some public structures, where the particular site is more essential than that of other public erections. But some may inquire why the *consent* of the state legislatures was required in this case? Evidently because the erections, thus provided for, of necessity would exclude the state jurisdiction. It would be inconsistent with the discipline of a fort or naval station to admit any joint jurisdiction of the states. From the very nature of the case the national authority must be exclusive of all other. But we cannot for a moment suppose that so carefully framed an instrument as the national Constitution could have used the term "consent" to a purchase by the nation, for its own use, as embracing also a purchase by the state, for the use of the nation. The things are radically distinct and different.

There are many other considerations, tending to show that this must have been the intent of this provision. The exercise of the power of eminent domain can only be effected in any case, state or national, by the action of the legislative department of the government. Neither the executive or judicial departments can act in such cases, except in conformity to legislative provisions, either general or special. The legislature must determine both the use

and the necessity, before any government can take private property. But how can the state legislatures judge of the public uses or necessities of the national government? We know it has been sometimes argued in these cases, both by counsel and courts, that the state providing for taking private property, for the use of railway and turnpike corporations, is analogous to its legislating for the condemnation of property, for the uses of the nation: *Gilmer* v. *Lime Point*, 18 Cal. 229. But these corporations are the mere instruments and dependencies of the states creating them. The uses and the necessities are those of the state, and it may as well adopt the agency of its own corporations, in carrying forward such enterprises, as to commit them to the agency of natural persons, its officers or appointees. It must of necessity act through some agency or organs, since it has no other mode of action. In *Reddall* v. *Bryan*, 14 Md. 444, the court argue, that the provision in the state Constitution, for taking property for public use, embraces the uses of the national government, since those uses are public. But *public* in this sense means pertaining to the same government. And no government can condemn private property for any use, which does not grow out of the duties and consequent necessities of the same government. The lexicographers define "public use" as "belonging to a state or nation:" Johnson; or, as Webster expresses it, "pertaining to a state, nation or community." It is upon this ground that the courts have held that the state legislatures cannot delegate to the municipalities, the power to foster the building up of their general commercial prosperity by means of taxation. Commercial prosperity may be, in a wide sense, of public concern, and a public benefit. But it is not a "public use," in the sense of the state Constitutions, for which private property may be condemned, either by way of taxation or of eminent domain.: *Allen* v. *Jay*, 12 Am. Law Reg. N. S. 481; 60 Me. 124; *Brewer* v. *Brewer*, 13 Am. Law Reg. N. S. 735; 62 Me. 62; *Weeks* v. *Milwaukee*, 10 Wisc. 242; *Lowell* v. *Boston*, 111 Mass. 454.

It would seem not to require much argument to show that the public or governmental uses of the states are not identical with those of the nation. The governments, and, by consequence, their public uses, are as completely separate and distinct from each other as those of any two states or countries, entirely foreign to each other, can possibly be. And the owners of private property may justly demand, that the sovereignty requiring the condemnation of

such property to its public uses, shall first, by its legislative department, determine the necessity of such condemnation, for those purposes. The fact that Congress has never made any general or special legislation, to this end, will afford no presumption against the existence of the power of eminent domain in the national government. That power is an indispensable function of all autocratic governments or sovereignties. It has no connection with the source of the title to property, and is in no sense a reservation in the grant of lands or other property, for, if so, most of the new states would not possess it, since the title of the lands in those states was not derived from the states but from the United States. Nor is the fact that the states may take land from the United States, within their limits, for public uses, as was held in *United States* v. *Railway Bridge Co.*, 6 McLean 517, and some other cases, any argument in favor of the states possessing the power of eminent domain, above that of the nation, as was argued by the court in *Gilmer* v. *Lime Point*, *supra*. In such cases the United States stand merely as proprietors, and possess no prerogatives of sovereignty in their title. If the states owned all the lands within their limits, that would not preclude the national government from taking so much of it as is required for its public uses. This power of taking the property of the other for public uses exists both in the states and the nation.

But in regard to all the public uses of the nation (except for forts and other naval and military uses), such as custom-houses, court-houses, post-offices, &c., and for railways and canals, where there is no necessity and no right to exclude state jurisdiction, there is no provision for obtaining even the consent of the states. It rests upon the general right of eminent domain, inherent in all complete and independent sovereignties. And, in the 5th article of amendment to the United States Constitution, we find the same provisions upon which the right of eminent domain rests, in all the states where there is any specific provision upon the subject, viz.: "Nor shall private property be taken for public use without just compensation." This must refer to the national government, since it has been often decided that all the provisions of the United States Constitution do refer to the national government, unless the states are specially named: *Barron* v. *Baltimore*, 7 Pet. 243; *Fox* v. *Ohio*, 5 How. 410. This has been decided in New Hampshire by the highest state court: *Concord Ry.* v. *Greely*, 17 N. H. 47;

Mt. Washington Ry., 35 Id. 134. How then can the same court possibly explain this limitation upon the exercise of the right of eminent domain, in the national Constitution, without conceding its existence in the national sovereignty, as it seems impliedly not to do in *Orr* v. *Quimby*, 54 N. H. 590, where the court held the state may condemn the land for the use of the nation. The idea of fixing a limitation upon the exercise of a power, which did not exist, no one will contend for. The court, in the case of *Orr* v. *Quimby*, *supra*, attempts to escape this conclusion, by saying the power of taking private property for the public uses of the nation may exist in the states, notwithstanding its existence in the national government. But this seems to us entirely inadmissible. If the nation possesses the power there is no necessity, and no propriety of resorting to the states for its exercise on their behalf. There is nothing analogous to such double powers for the same purpose, in any other respect. The power of the states to punish offences against the coinage or the securities of the nation, only exists so far as such offences affect the interests of the state. The states have no power to punish offences exclusively against the United States. This is too obvious and too well settled to justify the citation of authority. And it need not be argued how completely at the mercy of the states the idea of fixing the power of eminent domain, for national purposes, exclusively in the states, must leave the national government. It could not build a canal or improve the navigation of a river, or construct a railway, except by the action of the states. There was nothing, in our judgment, in the mad theory of the national sovereignty, which ripened into the rebellion and civil war, more flagrantly absurd than this. We have noticed the argument of the state courts, in favor of this view, in all the cases which we know of, except that of *Burt* v. *The Merchants' Ins. Co.*, 106 Mass. 356. In this case no argument is attempted. It is placed solely upon the long usage. And the Southern States might have justified most of their theories in the same way. The truth unquestionably is, that the national government has been compelled to allow many of its important national functions, hitherto, to lie in a state of suspended animation, and beg its way along, at the mercy of the states, in many very essential particulars, when its powers were most unquestionable. So that, mere silence on the part of the nation does not imply acqui-

escence. It was merely waiving, for the present, the exercise of its just powers, in order to quiet public opinion.

We might say much more, but we fear we may already have said more than will be read. We are happy in being able to refer to one decision by an able court, supported by a very able and satisfactory opinion, where the same conclusion was reached, with that above stated, but in a somewhat different course of reasoning, but one every way eminently satisfactory to us. We refer to the opinion of Mr. Justice COOLEY in *Trombley* v. *Humphrey*, 23 Mich. 471. We should certainly not have attempted any argument upon the question had we not regarded it as being important, and as we have before said fundamental in constitutional construction, and one which has not hitherto received that consideration, either from the profession or the courts, which it is fairly entitled to demand.

II. There is one other question connected with this subject, which is one of even more importance, so far as principle is concerned, than the one we have so extensively discussed: *i. e.*, at what time the owner of the property taken is entitled to receive the price of it. But it is most thoroughly and learnedly discussed in the dissenting opinion of Mr. Justice DOE, in *Orr* v. *Quimby*, *supra*, and we could add nothing valuable to what will there be found. It seems to us, that upon principle, the dissenting opinion, that the price must be paid concurrently with the taking, is well founded, and the tendency of judicial opinions in this country, is unquestionably in that direction. It has always seemed to us, that the provision in the American constitutions, requiring compensation to the owners of private property, taken for public use, was entitled to receive the natural and ordinary construction. And in ordinary cases, where there is no provision for credit, the seller is entitled to the price, concurrently with the delivery, and is not bound to make delivery until he receives the price, or some security which he is willing to accept in lieu of the price. This may not be practicable, in cases where the damage cannot be known till after the same is defined by the actual extent of the use. But in such cases the purchaser may be required to make an adequate deposit. And we see no reason why cases, where property is purchased by the state or a municipal corporation, or by the nation, should be any exception to the rule above stated. The security for ultimate ability to make payment may be more ample in such cases

than in that of private persons, natural or artificial. But that is not the chief objection, in this class of cases. The owner of the property is not bound to accept a right of action, and a possible lawsuit, in lieu of the price. He may well say, that he is not compellable to exchange his property for a lawsuit against any the most responsible party. And a mere claim against the sovereignty is even further from payment, than one against a party liable to be impleaded in the courts. And although this objection is not applicable to municipal corporations, yet even these are proverbially reluctant to meet promptly their legal obligations. We think, therefore, that upon principle the owner of property, so compulsorily deprived of it, is fairly entitled to have the compensation ready for his acceptance, at the very time he is deprived of it, or in exceptional cases, as soon as the damage or price can be ascertained, and that in neither case is a mere right of action, however secured, to be regarded as an equivalent. It is not desirable here to examine the cases upon this point, since they are very numerous, and may all be found in the dissenting opinion of Mr. Justice DOE, and in some of the elementary books, and nothing is clearer, than that no satisfactory rule upon the subject is deducible upon any adjustment of the preponderance of the decided cases. We have done what we could in that way in our work on Railways, Vol. I., § 73, pp. 296 *et seq.*, entitled "The time compensation is to be made." I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

DOVER *v.* ROBINSON ET AL.

The plea of sureties upon a collector's bond that it is not their deed, is well maintained by proof that subsequently to its delivery and approval, and without their knowledge or consent, but with the knowledge and consent of the selectmen of the town having custody of the bond, the penal sum was changed by the principal from twenty-five hundred to twenty-five thousand dollars.

Such an alteration, so made, avoids the bond as to the sureties. It cannot be deemed a spoliation by a stranger. The inhabitants of the town cannot maintain suit against the sureties upon a bond thus vitiated. The deliberate intentional permission of such an alteration, by their general financial agents, defeats their right to recover upon such bond against those not cognisant of the alteration nor taking any part therein, nor ratifying the same.

The town itself ratifies such permission by inserting in their writ a count upon the bond in its altered condition. They cannot take the chance of reaping a benefit therefrom without incurring at the same time a risk of loss.